

# WHOSE RIGHTS MATTER MOST? FATHERS' RIGHTS, JOINT CUSTODY, AND DOMESTIC VIOLENCE

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## INTRODUCTION

In recent years, the fathers' rights movement has gained increasing power and influence in the formation and judicial interpretation of custody and child support legislation. Despite statistics to the contrary, many fathers claim they were the victims of discrimination when they sought custody of their children. The fact remains that women continue to be the primary nurturers and caretakers of children; but, fathers' rights groups are working forcefully to change this pattern. The focus of these well-organized, often intensely zealous groups is a return to the traditional patriarchal family structure, popularized by the vacuous phrase "family values," in which the father is the head of the household and the family unit is insulated from any care the state would offer it.

This Comment addresses the relationship between the efforts of the fathers' rights movement to establish a joint custody presumption and legislation designed to protect victims of domestic violence. The push for a standard that, in effect, destroys substantial progress made to protect parents and children from domestic violence speaks volumes about the gendered assumptions that are still very much in place where child custody law is concerned. Although technically there has been a shift from gendered custody standards to the gender-neutral "best interest of the child" standard, when domestic violence is an issue in custody determinations, the law still operates to discriminate against

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women and, in particular, against victims of domestic violence.<sup>1</sup> Fathers' rights groups, though, are concerned with obtaining what they perceive as their rightful claim to their property (i.e., custody of their children) to the exclusion of all other societal issues plaguing women and families.

Part I of this Comment outlines the realities of domestic violence as a backdrop to the custody issues that follow. Part II discusses joint custody as it has emerged historically and politically as a controversial variation of the "best interest of the child" standard. Part III addresses the interplay between domestic violence and joint custody, and argues that the joint custody presumption is detrimental to battered women trying to raise their children in an atmosphere free of violence. Part IV concerns the fathers' rights movement, its forceful push for the joint custody presumption, and how several leaders of the movement respond to the issue of domestic violence as it relates to custody. Finally, this Comment concludes that domestic violence must be taken into greater consideration in custody determinations, and that the fathers' rights movement cannot be permitted to make light of the domestic violence issue because it injures not only the women victims but also the children.

## I. THE REALITIES OF DOMESTIC VIOLENCE

Domestic violence is an epidemic that strikes approximately four million American women each year.<sup>2</sup> Women are battered in at least twenty-eight percent of all marriages; every year, one of eight husbands physically abuses his wife.<sup>3</sup> The staggering statistics of abuse within marriage are an important focus of this Comment, in part because they affect custody decisions that are made in the context of

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1. Although there *are* male victims of domestic violence, the use of the term "victims" in this Comment refer to women victims, reflecting the fact that the overwhelming number of spouses who are battered are women.

2. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 807-08 (1993).

3. *Id.* at 809. The authors point out that, for reasons such as a woman's lack of financial and emotional resources and proficiency in English, these numbers are drastically underreported.

divorce,<sup>4</sup> and in part because they refute the fathers' rights movement's assertion that domestic violence is a disease that primarily plagues the unmarried.<sup>5</sup>

Domestic violence can assume many forms, including threats, harassment, stalking, and, most obviously, physical abuse. The violence most often occurs in a cycle,<sup>6</sup> beginning with "minor" incidents and arguments and culminating in protracted physical abuse. This is frequently followed by a period of repentance by the batterer, referred to by practitioners as the "hearts and flowers stage." Many victims are psychologically trapped in the cycle because the perpetrator apologizes and promises to change, and the victim is led to believe each time that that incident of violence will be the last one.

Traditionally, after several repetitions of this cycle, the woman begins to believe that she is helpless, that she cannot control the batterer, and, worse, that she cannot escape the violence. These dire consequences of the abuse cycle, above all else, help to explain why so many women stay in abusive relationships and are reluctant to seek help. Further, many battered women feel pigeonholed by what they perceive as their societal roles: if they leave, they are being unsupportive wives and are breaking up their families, and thus are also being neglectful mothers. Additionally, many women are economically dependent on their husbands and fear that they will not be able to provide for their children if they leave the marriage.<sup>7</sup>

The obstacles battered women face have been underaddressed by

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4. The issue of putative fathers' rights is a separate and equally complex one. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Compare *In the Interest of J.W.T.*, 872 S.W.2d 189 (Tex. 1994).

5. See generally DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995). The author, President of the National Fatherhood Initiative, writes that "married fatherhood serves as an institutional inhibitor of domestic violence against women." *Id.* at 245 n.33. Blankenhorn cites no source for this assertion. The aforementioned statistics of marital violence illustrate the specious nature of this claim. See, e.g., Del Martin *The Historical Roots of Domestic Violence*, in *DOMESTIC VIOLENCE ON TRIAL 3* (Daniel J. Sonkin ed., 1987).

6. See generally ANN JONES, *NEXT TIME SHE'LL BE DEAD* (1994) for a thorough discussion of battering cycles and societal responses to domestic violence.

7. *Id.* at 152.

the law and by society at large. Indeed, there are only 1200 battered women's shelters nationwide, many of which do not accept children.<sup>8</sup> Police often are slow and poorly trained in responding to calls of domestic disputes and violence.<sup>9</sup> Although there has been increased legislation at both the federal and state levels that seeks to assist battered women,<sup>10</sup> domestic violence occurs in epidemic numbers, a fact that continues to be ignored by judges in child custody cases. Joint custody arrangements often contribute to, rather than ameliorate, the history of violence.

## II. JOINT CUSTODY

### A. Background

Nationwide, the prevailing standard for custody is the "best interest of the child,"<sup>11</sup> which emerged after a history of child custody law that reflected gendered notions of family and the roles men and women play within that unit. Until the late nineteenth century, the norm for a father's custody was firmly in place as a result of his prescribed role to support his family.<sup>12</sup> Along with the financial obligation to his wife and children and his legal recognition as the head of the family came his right to custody.<sup>13</sup> As a result, custody of children became associated as a property right to which only men were entitled.<sup>14</sup>

The exclusive right of fathers to custody was challenged by early

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8. See AYUDA LEGAL SERVICES, HANDBOOK FOR DOMESTIC VIOLENCE TRAINING (on file with author).

9. See, e.g., *Raucci v. Town of Rotterdam*, 902 F.2d 1050 (2d Cir. 1990).

10. See, e.g., Protection From Abuse Act, 23 PA. CONS. STAT. ANN. §§ 6101-6118 (West 1991); 42 U.S.C.A. § 3796gg (1994).

11. Harvey R. Sorkow, *Best Interests of the Child: By Whose Definition?* 18 PEPP. L. REV. 383, 386 (1991) (asserting that 37 states have adopted legislative criteria to define the "best interest of the child" and the remaining states rely on precedent).

12. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988).

13. Sorkow, *supra* note 11, at 384.

14. Fineman, *supra* note 12, at 737 (defining "paternal familium").

feminists and by the newly established field of social work, whose focus was on the children rather than on the parents' rights to the children.<sup>15</sup> The standard of the "best interest of the child" was a natural product of the shift in focus from parents' rights to a child-centered norm premised on the welfare of the child and not on economic interests.

The "best interest of the child" standard is both difficult to define and to implement, consequently, a new set of presumptions emerged which were designed to help courts apply the standard. First, the "tender years" doctrine provided that children under seven should live with the mother.<sup>16</sup> Clearly, this reflected the traditional role of women as nurturers in the home. Yet, as more and more women entered the workforce, the tender years doctrine became objectionable to those who felt confined by the gendered norm embodied in the rule.<sup>17</sup> In part to offset the discrimination of the tender years doctrine and in part to respond to child development data, the second principle invoked to implement the best interest standard was "same-sex placement" for adolescents.<sup>18</sup> This system, too, was gender-based. Both the tender years and the same-sex placement doctrines came under attack after the *Orr v. Orr*<sup>19</sup> decision in 1979. Consequently, the custody standard shifted to "best interest," promoting individual assessments without blanket presumptions as to which parent is a better caretaker for the child. This appearance of gender-neutrality, however, fails to reflect the reality that people often *do* lead gendered lives.

As the "best interest of the child" standard is unpredictable and expensive, it has been criticized from all sides of the political and social continuum. Most pointedly, many fathers insist they have been

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15. *Id.*

16. *Id.* at 738.

17. Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody* 80 CALIF. L. REV. 615, 620 (1992).

18. Fineman, *supra* note 12, at 738-39.

19. 440 U.S. 268 (1979) (holding that a state statute requiring only husbands, but not wives to pay alimony upon divorce, was a violation of the Equal Protection Clause of the Constitution).

discriminated against in custody decisions.<sup>20</sup> They maintain that despite a facially neutral standard, the law favors women because women are considered to be the nurturers and men the moneymakers. As a result, fathers' rights groups are now lobbying forcefully for a joint custody presumption that would, they argue, level the child custody playing field.<sup>21</sup>

In 1957, North Carolina enacted the nation's first joint custody legislation.<sup>22</sup> The movement, though, began in earnest in 1979, when California enacted a statute establishing a presumption that joint custody was in the best interest of the child if the parents so agreed.<sup>23</sup> Since then, almost every state has considered legislation on joint custody, and more than forty states have some statutory provisions allowing the courts to award joint custody.<sup>24</sup>

### *B. Joint Custody Defined*

The term "joint custody" encompasses both legal and physical custody. Joint legal custody means both parents retain equal legal rights and responsibilities to the child at all times.<sup>25</sup> This includes the right to make decisions regarding the child's education, religion, medical care, and discipline. Joint physical custody refers to the sharing of physical living time and care of the child.<sup>26</sup> In some custody arrangements, the parents have both joint legal and joint physical custody.<sup>27</sup> While a legal custodian does not have to be a

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20. The reality is that the majority of men who seek custody of their children actually get it. The true bias in the court is against women, not men. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 231-35 (1985).

21. Jed H. Abraham, *Why Men Fight for Their Kids: How Bias in the System Puts Dads at a Disadvantage*, 17 FAM. ADVOC. 48, 56 (1994).

22. JAY FOLBERG, *JOINT CUSTODY AND SHARED PARENTING* 5 (1984). See N.C. GEN. STAT. §50-13.2 (1996).

23. See CAL. FAM. CODE § 3080 (West 1994).

24. Abraham, *supra* note 21, at 50.

25. Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 503 (1988).

26. *Id.*

27. Although it is possible to have joint legal custody and not joint physical custody, the primary concern here is with situations in which both parents retain

physical custodian in order to retain and exercise decisionmaking rights, the physical custodian is responsible for day-to-day childrearing duties.<sup>28</sup>

### C. Joint Custody Presumptions

There are three forms of the joint custody presumption: (1) a presumption only when parents agree to a joint custody arrangement;<sup>29</sup> (2) the ability of the court to order joint custody in any custody dispute regardless of whether the parents agree;<sup>30</sup> or (3) a blanket joint custody presumption that applies to all cases.<sup>31</sup> Under a presumption statute, joint custody is surmised by law to be in the best interest of the child, thus sole custody is ordered only when the presumption is rebutted by evidence proving that joint custody is detrimental to the child's best interest.<sup>32</sup>

A batterer is not prevented from obtaining custody of his children under any of the three joint custody models.<sup>33</sup> Joint custody, as the norm, is assumed to be appropriate for all or most cases. Consequently, sole custody is relegated to an exception only considered after the court has decided against joint custody. The degree to which joint custody is a rebuttable presumption depends both on jurisdiction and judicial discretion.

Two important suppositions are implicit in a joint custody presumption: first, that the parents will be able to cooperate in raising their children and transporting them between homes, regardless of whether the parents have freely chosen joint custody; and second, that the harm caused to the children by interparental conflict will be

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legal and physical custody of the children, for the goal of the fathers' rights movement is for men to attain *both*.

28. Singer & Reynolds, *supra* note 25, at 503-04.

29. See, e.g., UTAH CODE ANN. § 30-3-10.2 (1995).

30. See, e.g., MICH. COMP. LAWS ANN. § 722.26a (West 1993).

31. See, e.g., FLA. STAT. ANN. § 61.13(2)(b) (West 1985).

32. Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 539, 551 (1982).

33. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1063 (1991).

outweighed by the benefit of continuing a parent-child relationship with both parents. At a minimum, joint custody requires that the parents communicate and put aside personal differences and post-divorce hostility. In situations in which there is a custody battle so fierce that a judge -- a complete stranger to the relationship -- must decide with whom the child will reside, the underlying assumptions of a joint custody arrangement are precarious at best. When the marriage and separation have been riddled with domestic violence, the assumptions fall apart completely.<sup>34</sup>

### III. THE DANGER OF JOINT CUSTODY WHERE DOMESTIC VIOLENCE HAS OCCURRED

Facially, joint custody arrangements are more equitable versions of the "best interest of the child" standard insofar as they provide both parents with access to and responsibility for the child. Yet, in situations in which domestic violence has occurred, joint custody may be a fatal arrangement for both the child and the battered woman. Joint custody is predicated on "an extraordinary level of cooperation, communication, and goodwill between the parents."<sup>35</sup> Ironically, these qualities, among others, are precisely those missing from violent relationships.

In cases of domestic violence, the victim can cooperate with the batterer only under duress.<sup>36</sup> A battered woman generally wants her abuser to stay away,<sup>37</sup> but joint custody precludes full separation because the parents must transfer children back and forth and participate jointly in decisionmaking.<sup>38</sup> This ongoing communication

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34. Lenore E.A. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, in DOMESTIC VIOLENCE ON TRIAL 127, 140 (Daniel J. Sonkin ed., 1987) ("Joint custody. . . is impossible for most relationships where there has been spouse or child abuse because mutual decisionmaking cannot occur.").

35. Weitzman, *supra* note 20, at 247.

36. Cahn, *supra* note 33, at 1067.

37. Most protection orders against abusers contain "stay-away" provisions as the key to preventing further domestic violence.

38. See, e.g., *Sturgill v. Wriston*, 1994 WL 838133 (Del. Fam. Ct.). The court in this case ignores the history of brutality during the couple's relationship and



provides the batterer with greater opportunity to perpetuate his abuse.<sup>39</sup>

People often question why battered women stay with their abusers. In addition to the battering cycle that figures into a victim's psychology,<sup>40</sup> many battered women are well aware that the probability they will be killed by their batterers increases exponentially if they attempt to leave the relationship.<sup>41</sup> This fear of heightened abuse after separation underscores the danger of joint custody arrangements in violent relationships. Many batterers would rather kill their wives or ex-wives than lose the control over them that comes with separation and divorce.<sup>42</sup> As Catherine Klein and Leslye Orloff observe, "the propensity for continued violence remains after the divorce or separation and frequently recurs during unsupervised visitation or joint custody. Court orders which force victims to share custody with their abusers place both victims and children in danger . . . ."<sup>43</sup> Additionally, they note that "[d]etermination of custody and visitation of children are ways in which batterers frequently continue their harassment and other abuse."<sup>44</sup>

The control and duress that accompany an ongoing relationship with an abusive ex-husband are manifested in ways beyond the increased potential for harm to the victim and the children. Most

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the statutory provisions regarding custody in domestic violence cases. *Id.* at \*9-10. Disregarding the documented effects of the violence cycle, the judge considers joint custody to be an appropriate lesson in cooperation. "Notwithstanding the domestic violence perpetrated by father, I am satisfied that a joint custody Order is appropriate herein because I believe that the parties should be required to continue to discuss issues involving their child, and that they should be forced to learn to do so in a more amicable and conciliatory fashion than they have done in the past." *Id.* at \*15.

39. Cahn, *supra* note 33, at 1064.

40. See *supra* note 6 and accompanying text for discussion concerning the cycle of violence.

41. LENORE E. WALKER, TERRIFYING LOVE: HOW BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 47 (1989). Walker rebuts the claim that battering stops the minute the victim leaves her abuser. "[T]he abuse often escalates at the point of separation and battered women are in greater danger of dying then." *Id.*

42. *Id.* at 65.

43. Klein & Orloff, *supra* note 2, at 952.

44. *Id.* at 953.

prominently, because a battered woman is under duress in dealing with her abuser, he may use his power to impact the custody and financial arrangements; and, "[b]ecause of his control and her fear, the battered spouse may agree to custody provisions which are not really desirable for herself or the children. Alternatively, the battered spouse may trade financial support or equitable distribution of assets for more protective custody or visitation."<sup>45</sup>

The unfair and unequal bargaining powers of the parties may develop to the extent that the victim decides the protracted violence, in addition to the stresses of divorce and custody, are not worthwhile and may choose instead to return to a violent marriage. For these reasons, judges and lawmakers should not be so quick to presume that joint custody is always the best solution to the post-divorce custody dilemma.<sup>46</sup>

Overall, courts and legislatures have been slow to recognize the correlation between domestic violence and child custody determinations. In 1990, however, Congress passed a Concurrent Resolution that, for the purpose of determining child custody, "credible evidence of physical abuse of one's spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse."<sup>47</sup> The Resolution specifically states that "joint custody guarantees the batterer continued access and control over the battered spouse's life through their children"<sup>48</sup> and that "joint custody forced upon hostile parents can create a dangerous psychological environment for a child."<sup>49</sup>

This Resolution, along with growing research that reveals that children exposed to spousal abuse experience physical and emotional harm, has encouraged many states to pass legislation incorporating domestic violence into custody decisions.<sup>50</sup> The effects of domestic

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45. *See id.*

46. *Id.* at 950.

47. H.R. Con. Res. 172, 101st Cong., 136 Cong. Rec. H8280-02, § 1 (1990) (enacted) (listing harms to children from wife abuse).

48. *Id.* pmbl.

49. *Id.*

50. *See, e.g.,* D.C. CODE ANN. § 16-911(a)(5)(Q)(a-1) (Supp. 1996) ("The party found to have committed an intrafamily offense has the burden of proving that

violence on the child, however, are still perceived by many as being indirect and thus innocuous and are rarely considered in custody determinations. Studies, on the other hand, have shown that even if children are not abused *directly* by a battering spouse, they are, nonetheless, victims of the violence. This cuts two ways, as an expert in *In re the Marriage of Houtchens*<sup>51</sup> confirmed that "children are at risk living with men who batter, both because of the likelihood that the child will be battered and the likelihood that the child will rely on that person as a role model."<sup>52</sup> In other words, there are both current<sup>53</sup> and long-term<sup>54</sup> repercussions for a child who lives amid domestic violence.

When making custody determinations in cases of violent relationships, courts remain reluctant to consider the impact of abuse on children and the effect of joint custody arrangements on battered women. In reality, a woman's allegation of domestic violence in the context of a custody dispute actually works *against* her efforts to obtain custody. According to the "most generous parent" or "friendly parent" provision of many custody statutes, the parent who is willing to make the most concessions and who is most agreeable and flexible is considered to be the better parent.<sup>55</sup> Thus, a battered woman who is reluctant to cooperate with her abuser is disfavored in custody

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visitation will not endanger the child or significantly impair the child's emotional development.").

51. 760 P.2d 71 (Mont. 1988) (holding that evidence of fathers physical abuse of mother is related to the best interest of the child and should be considered in custody determination).

52. *Id.* at 72.

53. Cahn, *supra* note 33, at 1057-58 (discussing the emotional impact on children who are witnesses to domestic violence, as well as the "intergenerational" patterns that result). *See also* Campbell v. Campbell, 584 So.2d 125, 127 (Fla. Dist. Ct. App. 1991) (the court duly notes the effects of ongoing contact between batterer and battered woman on the child, stating "[s]urely, fear that a custodial parent will be assaulted or battered by a non-custodial parent constitutes an act of domestic violence as to their child.").

54. Cahn, *supra* note 33, at 1058 ("[C]hildren of violent fathers are more likely to be violent themselves.").

55. *Id.* at 1064.

decisions.<sup>56</sup> Until courts recognize the interrelationship between joint custody and domestic violence, battered women will remain unprotected from their abusers. For this reason, statutes that consider spouse abuse as a factor in determining the best interest of the child are preferable to joint custody presumption statutes.<sup>57</sup>

Nonetheless, despite statutory efforts to take domestic violence into account when making custody determinations, "[n]one of these statutes prevents an abusive father, even one who has killed the mother, from winning a custody battle . . . ."<sup>58</sup> Although the statutes are a step in the right direction, for the most part domestic violence remains only one of a long list of factors<sup>59</sup> that aid the court in determining the best interest of the child, and therefore, the statutory provisions remain inadequate. Notwithstanding the statutes mandating the court to consider domestic violence when making custody determinations, the ultimate decision of according the weight of the violence to the custody determination resides at the judge's sole

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56. *Id.* ("In states that have a statutory preference for joint custody or for custody awards to the parent who is more willing to share the child, the battered woman must accede to joint custody or risk losing custody. If she appears to the court unlikely to want to share the child with the batterer, a court may give custody to the father instead.")

57. *See, e.g.*, LA. REV. STAT. ANN. § 9:335 (West 1994) (creating a rebuttable presumption against awarding joint or sole custody to the abusive spouse).

58. Cahn, *supra* note 33, at 1063. *See also* Lutgen v. Lutgen, 532 N.E.2d 976 (Ill. App. Ct. 1988), *cert. denied*, 537 N.E.2d 811 (Ill. 1989) (The Illinois Appellate Court granted custody to the father once he was released from prison for choking to death the mother in front of the children. The court considered the six statutory factors for determining the best interest of the child, one of which was "the physical violence . . . by the child's potential custodian, whether directed against the child or directed against another person but witnessed by the child." 532 N.E.2d at 971. The court, using its discretion and opting to give this stipulation little weight, concluded that "[o]ther than the tragic circumstances which resulted in the death of [mother], [father] has an unblemished record." *Id.* at 970.). *But see* Bruner v. Hager, 534 N.W.2d 825, 828 (N.D. 1995) (asserting that "[a] trial court cannot treat the violence-presumption as simply another factor in custody. . . . The presumption places an emphasis on domestic violence as the paramount factor in a custodial placement when credible evidence of domestic violence appears.").

59. The factors considered by the court in a custody award depend on the jurisdiction.

discretion.<sup>60</sup>

Admittedly, the best interest of the child standard is imperfect, even when it is combined with legislation that takes domestic violence into consideration. Nonetheless, if the child's interests are the true focus, it is a far better standard than the joint custody presumption. The blanket presumption, though, technically a variation on the best interest of the child standard, essentially works to replace it. Joint custody presumptions, express and implied, contradict and abrogate the "best interest of the child" standard.

A possible solution offered by some feminist scholars is to replace the "best interest" standard with a "primary caretaker" presumption. Professor Naomi Cahn has noted that this "will probably result in a custody award to the victim. Most victims of domestic violence are women, and most primary caretakers are women."<sup>61</sup> Critics of the primary caretaker standard insist, however, that this would create too much of a pro-mother bias in custody cases.<sup>62</sup> The primary caretaker standard, not unlike the joint custody presumption, is a blanket presumption of reward. However, while the former rightly reflects the parents' behavior prior to divorce,<sup>63</sup> the latter is administered regardless of displayed parental participation and parenting ability. The basis of the "best interest" standard, in contrast, is a *case-by-case* determination, rather than a "presumption," of what is best for *all* children.

The notion of universal presumptions of what is best for the family must be examined in conjunction with the recognition that its advocates are, in effect, fighting for a recapitulation of the traditional, patriarchal family structure, where fathers' "ownership" of their children trumped the children's best interest.<sup>64</sup>

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60. Cahn, *supra* note 33, at 1065. Also note that these decisions are rarely appealed, primarily because of the expense and because courts look favorably on continuity for the child. Thus, courts remain reluctant to overturn prior decisions absent neglect or a significant change in circumstances (i.e., a modification order).

61. *Id.* at 1060 n.106.

62. For a refutation of this criticism, see Fineman, *supra* note 12, at 773.

63. *Id.* at 770.

64. *Id.* at 737.

#### IV. THE FATHERS' RIGHTS MOVEMENT'S PUSH FOR A JOINT CUSTODY PRESUMPTION

Fathers' rights groups are, essentially, well organized campaigns for the rights of the father, absent any true consideration for the status of the child or the mother. The movement<sup>65</sup> has made the joint custody presumption one of its central concerns and has been fairly successful in its ventures.<sup>66</sup>

The impetus for this movement has been the members' general belief that fathers have been discriminated against by courts and by judges in attempts to obtain custody of their children.<sup>67</sup> In other words, men have been prevented from being responsible, attentive fathers by a system patently biased toward mothers.<sup>68</sup> As a result, the fathers' rights movement has worked to deconstruct traditional gender roles, aided by their battle cry that "[m]other is a verb, not a noun."<sup>69</sup> Insisting that fathers are suitable for more than just child support payments,<sup>70</sup> they say, "we're more than walking wallets".<sup>71</sup>

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65. There are, in essence, two types of fathers' rights groups: one lobbies for and litigates issues concerning child support and joint custody, and the other is more concerned with getting fathers involved with their children as a bridge to returning to a patriarchal system of "family values." Of course, there is overlap. In fairness, there are different types of fathers' rights groups; some are more moderate than others, but most have comparable political bents.

66. See generally Abraham, *supra* note 21.

67. PHYLLIS CHESLER, *MOTHERS ON TRIAL* 425 (1986). It is also interesting to note that the movement even has a site on the Internet that allows disgruntled fathers to post the names of "discriminatory" judges, presumably to enable other fathers to "forum shop."

68. See TERRY ARENDELL, *FATHERS AND DIVORCE* 48 (1995). One of the men in Arendell's study equated his experience as a divorced father to that of a pre-Civil War slave. But see Cahn, *supra* note 33, at 1060 n.106 (rebutting the fathers' rights movement's assertion of discrimination by noting that "when fathers actively sought physical custody, mothers obtained primary custody in only 7% of the cases" (quoting MASSACHUSETTS GENDER BIAS STUDY COMMITTEE, *GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT* 62 (1989)).

69. Chesler, *supra* note 67, at 425.

70. Abraham, *supra* note 21, at 49. Abraham notes that "fathers, however, were not forgotten. They were awarded a consolation invented just for them. They were ordered to pay child support to mothers." *Id.* One of the most disconcerting

The rhetoric of the fathers' rights movement, however, is not borne out statistically, as there is little empirical data suggesting that a blanket joint custody presumption really is in the best interest of the child.<sup>72</sup> Several of the fathers' rights groups allege that the involvement of both parents in a child's life reduces the child's chances of being involved in drugs, crime, or teenage pregnancy by tenfold.<sup>73</sup> The joint custody presumption offers precisely this brand of easy-out answers, but children deserve more individual consideration.<sup>74</sup>

Children, the movement seems to suggest, are property that should be distributed equally, just like any other marital asset.<sup>75</sup> Indeed, the language of the movement is that of entitlement.<sup>76</sup> This in itself suggests that the focus of custody has been misplaced. The move from traditional fathers' rights to children's rights has not, in fact, occurred to the extent where courts are truly taking into account the child's best interest. What is needed, therefore, is not a fathers' rights movement, but a stronger children's rights lobby.<sup>77</sup>

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aspects of the fathers' rights movement is its general dearth of supporting data and its misuse of the social science data it *does* employ. *See generally* Martha Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107.

71. Fineman & Opie, *supra* note 70, at 116 (citation omitted).

72. Singer & Reynolds, *supra* note 25, at 506-08. The authors assert that the joint custody tests are poor indications of the standard's efficacy because most of the sample groups are too small, not random, and the children's adjustment to the joint custody arrangement is registered only through parental interviews. *Id.* Rather, the authors suggest, the arguments for joint custody are based on the patriarchal family model and an anti-mother, anti-feminist backlash. *Id.* at 511-12.

73. *See, e.g.*, Telephone Interview with Joseph McMillan, Assistant Operations Director, *National Congress for Fathers and Children* (Nov. 22, 1995).

74. Singer & Reynolds, *supra* note 25, at 515.

75. Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 55 (1994).

76. Arendell, *supra* note 68, at 49. The author suggests that fathers are losing the authority that they once had over their families, and they believe that dominance is their *right* to regain.

77. Fitzgerald, *supra* note 75, at 60. Fitzgerald claims that, despite a lack of empirical evidence in support of a joint custody presumption, "[c]ourts. . . choose

Nevertheless, the current movement for fathers' rights in the form of a statutory presumption for joint legal and physical custody endures.

Little attention has been devoted to the clash between joint custody and domestic violence in the fathers' rights literature. The general reaction by fathers' rights advocates to the domestic violence concern is to question the veracity of the abuse allegation,<sup>78</sup> and in so doing, they implicitly point to the "hysteria," unfitness, and lack of co-operation of the mother. This is nothing less than anti-mother, anti-woman, and anti-feminist backlash that is debunked repeatedly by statistical data concerning the domestic violence epidemic. The problem, of course, is that courts often echo the disgruntled fathers' sentiment, disfavoring the parent who complicates matters by claiming domestic violence.<sup>79</sup>

Although not in the fathers' rights literature, when pressed, representatives of some groups have responded to the question of the bridge between domestic violence and the joint custody presumption. In their comments, these men have revealed a great deal about both their biases and their goals. In sum, there are two keys to the fathers' rights movement. First is the notion that single parenthood is deviant<sup>80</sup> and that children with two parents are "ten times less likely to get involved with drugs, violence, and pregnancy."<sup>81</sup> In other words, many of these organizations advocate "family values" to the extent that we make a general societal return to the patriarchal family

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between parental interests and ignore the child's." *Id.* See also MARTHA FINEMAN, *THE NEUTERED MOTHER* 201 (1995) ("The rhetoric of fathers' rights and fathers' responsibilities reflects the tendency to reduce family policy to mere discussions of individual rights.").

78. Abraham, *supra* note 21, at 52 ("Counterpoint to the alienation of the children [from the father because they are brainwashed by the mother] is the false domestic violence charge.").

79. For discussion on "friendly parenting" provision, see *supra* note 55 and accompanying text.

80. Telephone Interview with Joseph McMillan, *supra* note 73 ("The people who are most likely to physically abuse their children are mothers, not fathers. Especially single parent moms where the stress of single parenting really gets to them.").

81. *Id.*



structure.<sup>82</sup> Fathers' rights, not children's rights and not the rights of battered women, are essential to the restoration of *pater familias*.<sup>83</sup>

Second, the representatives of the movement insist that "joint custody does not commingle with the abuse issue."<sup>84</sup> Many advocates have asked, rhetorically, why it is domestic violence never arises until divorce and custody fights begin.<sup>85</sup> While this question shows a lack of understanding of the psyche of a battered woman, it also illustrates an unwillingness to accept the domestic violence charge as legitimate. David Levy, President of the Children's Rights Council, asserts that there are often false allegations of domestic violence in the context of divorce "in order to gain leverage in a custody dispute . . . Right now, a mere allegation is enough to interrupt a fathers' access to his children."<sup>86</sup>

In a similar fashion, Joseph McMillan, Assistant Operations Director of the National Congress for Fathers and Children, said:

Men have parenting instincts in them, as well, believe it or not. Think about it: if someone goes up to a mother grizzly bear and tries to take her cub away, she'll harm that person, right? When mothers try to take children away from their fathers, the fathers may attack in a similar manner. Many women say that men will never see their kids again, so men strike back, sometimes physically, and this is understandable.<sup>87</sup>

Conflicting messages are being sent. On the one hand, the fathers'

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82. See Abraham, *supra* note 21, at 51 (Denouncing statistical data generally, Abraham writes, "[t]he case for joint custody rests--and shall always rest--not on the evanescent evidence of social science but on the enduring efficacy of family values.").

83. Telephone Interview with David Blankenhorn, President, *National Fatherhood Initiative* (Nov. 23, 1995) ("The best family is where there is a mommy and a daddy. . . . Where that union absolutely cannot stand, joint custody is better in ensuring fathers' rights.").

84. Telephone Interview with Joseph McMillan, *supra* note 73.

85. See Telephone Interviews conducted by author with advocates of the fathers' rights movement (on file with author).

86. Telephone Interview with David Levy, President, *Children's Rights Council* (Dec. 15, 1995).

87. Telephone Interview with Joseph McMillan, *supra* note 73.

rights advocates are arguing that a domestic violence allegation is a ploy used by women to obtain full custody of their children at the expense of the fathers' parenting right. On the other hand, they are suggesting that men are justified in post-separation violence as means to obtain their children. Again, fathers' rights above all.

## V. CONCLUSION

Fathers' rights groups emerge as a sweeping movement replete with bizarre contradictions. These are men who want to defy the tradition of woman as nurturer and take an active role in their children's lives. This facet, commendable on the surface, ends up as a mere regression back to *pater familias*, and denounces the rights of the children for which they fight so fervently. Rather than establishing amicable ties with mothers, which truly *would* be in the child's best interest, the various fathers' groups insist on devaluing the role of the mother and degrading women in general. The bottom line is that a father's violence, even in the insular domestic sphere, should call into question his parenting ability and the degree to which he is fit to care for the child in the child's best interest.

It is not, however, entirely surprising that fathers' rights groups doubt the veracity of the domestic violence charge. Indeed, in repeatedly having awarded joint custody in abusive relationships, various courts have demonstrated that they also do not take seriously incidents of domestic violence. Perhaps legislative and court reform for battered women is the appropriate place to start in the attempt to mend this custody dilemma. Fathers' rights groups, however, should not be so easily permitted to shield themselves behind claims of discrimination and joint custody presumptions. In the name of fathers' rights, men in the movement make light of domestic violence, battery that does injury not only to women but to the children whose best interests they purport to champion.